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No. 95-161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRED W. TRIEM and DAVID A. BERG,

Petitioners.

v.

TAMICO, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

PETITIONERS' REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This is a case about judicial piracy. This maritime salvage case was tried in a state court instead of in an admiralty court. Tamico, Inc., the respondent, does not contest this basic fact (that the litigation occurred in a state court rather than in an admiralty court). Instead, Tamico contends that *both* state courts and federal courts can hear admiralty cases. This is the central issue presented for

decision: Do state courts have a concurrent jurisdiction to hear admiralty and maritime cases?

I. The admiralty jurisdiction cannot be both exclusive and also concurrent

The law is in hopeless conflict. Tamico argues that admiralty "cases can be filed in state or federal court; the federal courts *may* have jurisdiction. . . . .[T]here is no conflict with the Constitution created by allowing the matter to remain in State court." Tamico Brief at pgs. 4-5 (italics in the original). Petitioners say that the jurisdiction to hear maritime salvage cases in federal courts is exclusive; respondent says it is concurrent.

This is a paradigm for granting certiorari because this important issue of federal law, which affects our commerce with foreign nations, needs to be resolved. *Compare*, Courtney Wilder Stanton, *State Jurisdiction in the Maritime Realm: Herein the Saving Clause, its Background, Scope and Effect*, 16 MERCER L.REV 450, 459 (1965) ("The saving clause . . . provides for a concurrent in personam jurisdiction of courts of common law, both state and federal. The remedy at common law is accorded to suitors in addition to their remedy in admiralty so that either of the concurrent remedies may be elected")(student note) *with* W. T. Beeks and Gordon W. Moss, *The Exclusive Admiralty Jurisdiction*, 27 WASH. L.REV 176 (1952)("In the Judiciary Act of 1789, Congress granted exclusive original jurisdiction in all civil causes of admiralty and maritime jurisdiction to the United States District Courts"). This issue needs to be decided by the Supreme Court.

II. Litigation about a maritime contract is within the admiralty jurisdiction

Tamico contends that because there was a contract between the parties, therefore a dispute about the contract can be litigated in state court. But this contract is a *maritime contract* and therefore is within the admiralty jurisdiction. *DeLovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815)(No.3776)(maritime contracts are within the admiralty jurisdiction), *approved, Insurance Company v. Dunham*, 78 U.S. (11 Wall.) 1, 20 L.Ed. 90 (1871).

III. Salvage contracts are within the admiralty and maritime jurisdiction

Tamico mistakenly argues that "contractual salvage . . . is excluded from the category of exclusive maritime jurisdiction." Tamico Brief at page 7. There is a vast armada of federal law to the contrary, including decisions of this Court. In a long line of cases dating back to the early days of our Republic, the admiralty courts have held that salvage actions are within the exclusive jurisdiction of the admiralty court—regardless of whether there is a contract, regardless of whether the contract is for a fixed amount, regardless of whether the contract is absolute or contingent upon the outcome. *Brevoor v. The Fair American*, 1 Pet. Adm. Rep. 87, 4 F. Cas. 73 (D.Pa. 1800)(No. 1,847);*The A.D. Patchin*, 1 F. Cas. 183, (N.D. N.Y. 1849) No. 87; *The Jenny Lind*, 29 F. Cas. 1365, (E.D. La 1853) (No. 17,723); *The Circassian*, 5 F. Cas. 702 (E.D. NY 1868) (No. 2,723); *The Louisa Jane*, 15 F. Cas. 949 (D. Mass. 1873) (No. 8,532); *The Williams*, 29 F. Cas.1342 (E.D. Mich. 1873) (No. 17,710); *The Roanoake*, 50 F. 574 (E.D. Wisc. 1892). Salvage contracts are within the admiralty jurisdiction. *Andrews v. Wall*, 3 Howard 568, 572-573, 11 L.Ed. 729, 731 (1845)(Story, J.).

IV. The Decisions of the state courts are in irreconcilable conflict

There are significant state court decisions on both sides of this issue: Do state courts have jurisdiction to hear admiralty cases? Tamico cites three examples of state court cases that have decided maritime salvage issues: *Merritt and Chapman Derrick and Wrecking Company v. Tice*, 77 App. Div. 326 (N.Y. 1902)(contract for salvage); *State v. Vernooy*, 486 N.Y.S.2d 735 (A.D. 1985)(salvage action against the state); *Thames Shipyard and Repair Company v. Willametz*, 428 A.2d 1143 (Conn.Super 1978)(oral contract for maritime salvage).

But many state appellate courts have held that only the federal courts sitting in admiralty can decide maritime salvage cases, notwithstanding the Saving to Suitors Clause. Examples include: *O'Neill v. Schoenbrod*, 355 So.2d 440 (Fla.App. 1978) *appeal dismissed*, 359 So.2d 1218 (Fla. 1978)(maritime salvage is within the exclusive jurisdiction of the federal court sitting in admiralty; state courts cannot hear salvage cases); *Frith v. Crowell*, 5 Barb. 209 (N.Y. 1849)("In the first place this is not a proper tribunal to try a question of salvage"); *Boyd v. The Falcon*, 1 Handy 362, 364 (Ohio 1854)("the proper determination of such a claim can alone be had in the admiralty . . .").

V. There is a conflict between state law and the federal constitution

Tamico's citation to so much case law approving a concurrent jurisdiction demonstrates why certiorari should be granted. Not only do some state courts think they can hear admiralty cases, but there are dicta in some federal cases that support Tamico's position. *See, e.g. Metropolitan Dade County v. One Bronze Cannon*, 537 F.Supp. 923 (Fla. 1982); *Bergeron v. Quality Shipyards, Inc.*, 765 F.Supp. 321, 323 (E.D. La. 1991) (state courts have con-

current jurisdiction to try *in personam* admiralty actions, citing Saving to Suitors Clause); *Fogleman v. Tidewater Barges, Inc.*, 747 F.Supp. 348, 354 (E.D. La. 1990) (plaintiff can file a maritime action in state court under the Saving to Suitors Clause, which preserves the plaintiff's right to common law remedies).

VI. Admiralty cases in state courts can impair our international treaties and commerce with foreign nations

Our salvage treaties with other nations—and the uniformity of maritime law—are at risk here. If state courts can decide admiralty cases, then state courts can adjudicate the central issues governed by our treaties with foreign nations. And maritime law is a form of international law over which state courts should have no authority.

Our Nation is a signatory to salvage treaties with every major nation in the world. Federal law has implemented these treaties. Salvage Act of 1912, 37 Stat. 242 (1912), codified at 46 U.S.C. § 727-731. When the state district court in Petersburg, Alaska decides issues arising out of maritime salvage in an international shipping lane, at a site within a few miles of the Canadian border, the state court potentially can decide issues involving international commerce and treaties. For instance, the object salvaged here in this case was an airplane that was en route from Fairbanks, Alaska to Los Angeles, California—necessarily a trip through Canadian air space. *Kolovrat v. Oregon*, 366 U.S. 400 (1965)(certiorari was granted "because the cases involve important rights asserted in reliance upon federal treaty obligations").

VII. This is a question of federal law and international law that deserves a *federal* decision

When the Constitution is being interpreted, the final voice to be heard should be that of the Supreme Court, and not that of the state court. The courts of Alaska have adopted a judicial policy that allows them to hear admiralty cases.[1] Alaska's judicial policy places a cloud on the authority of the federal courts as the exclusive forum for admiralty and maritime litigation. This is the very type of dispute for which certiorari should be granted. *Alaska v. Arctic Maid*, 366 U.S. 199 (1961) (certiorari granted simply "because of the importance of the ruling to the new State of Alaska"); *Alaska v. American Can Co.*, 358 U.S. 224 (1959) (certiorari granted "in view of the fiscal importance of the question to Alaska," even though the tax statute involved had been repealed); *Davis v. Alaska*, 415 U.S. 308 (1974)(certiorari to review Alaska judicial policy of confrontation in criminal cases); *cf. Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974)(certiorari may issue where the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution).

As Tamico's brief demonstrates, there are authorities on both sides of this important constitutional issue. Some courts and writers believe that state courts have a concurrent jurisdiction to hear admiralty and maritime cases. Those authorities invoke the Saving to Suitors Clause. But as Justice Field explained long ago, that Clause was intended only to give a common law remedy, but not in a common law court. *The Moses Taylor*, 71 U.S. (4 Wall) 411, 431, 19 L.Ed. 397, 402 (1867)("It is not a remedy in

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[1] Another recent example is the decision of the Supreme Court of Alaska in *Jensen v. Goresen*, 881 P.2d 1119 (Alaska 1994)(collision between two fishing vessels in the navigable waters of Prince William Sound; sustaining a jury award of damages).

the common law courts which is saved, but a common law remedy"); *followed in, Jansson v. Swedish American Line*, 185 F.2d 212, 216 (1st Cir. 1950); *Roth v. Cox*, 210 F.2d 76, 79 (5th Cir. 1954); *see also, Crispin Co. v. Lykes Bros. Steamship Company*, 134 F.Supp 704, 707 (S.D. Texas 1955)("the 'Savings to Suitors' Clause has long been construed to afford litigants a choice of remedies, not of forums," citing *The Moses Taylor*).

VIII. The Saving to Suitors Clause was designed to preserve the right to jury trial in customs offenses—not to shift admiralty cases into state courts

The original location of the Saving to Suitors Clause in the First Judiciary Act (in the middle of a long section of exclusive jurisdictional grants) demonstrates that it was not intended to create or implement a concurrent jurisdiction in state courts.

The Alaska decision is clearly wrong and it should summarily be reversed. In the alternative, petitioners should have 50 pages and 30 minutes within which to explain why there is no concurrent jurisdiction that would allow state courts to hear admiralty and maritime cases.

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